(28)

No. 00-596

IN THE

Supreme Court of the United States

LORILLARD TOBACCO COMPANY, et al.,
Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL
OF MASSACHUSETTS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR TOBACCO-FREE KIDS, PUBLIC CITIZEN, INC., AND NINE OTHER PUBLIC HEALTH GROUPS IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

This brief in support of respondent is submitted by the National Center for Tobacco-Free Kids, Public Citizen, Inc., and nine other public health organizations dedicated to tobacco control efforts.[1] Amici are more fully described in the appendix to this brief. Amici share a common interest in supporting the Massachusetts Attorney General's effort to protect children from the tobacco industry's efforts to entice children to experiment with tobacco. Amici file this brief to highlight two points. First, this Court should reject petitioners' preemption argument because there is no indication that Congress, when it addressed the question of tobacco labeling in 1969, intended to eliminate the power of states and local governments to regulate the placement of tobacco advertising. Second, this Court should reject petitioners' invitation to rewrite the law governing commercial speech. Amici's counsel have represented parties seeking to invalidate speech restraints in a number of cases, including *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), and *Edenfield v. Fane*, 507 U.S. 761 (1993). Amici believe that the framework developed by this Court in *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980), to judge restraints on commercial speech strikes the appropriate balance between safeguarding the free speech rights of commercial actors and preserving the ability of government to prevent harm to consumers.

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[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than amici and their counsel made any monetary contribution to its preparation and submission. The parties' letters consenting to the filing of this brief are on file with the Clerk of the Court.

BACKGROUND

Although petitioners' brief makes no mention of the public health imperative that lies at the heart of this case, the Massachusetts regulations at issue, 940 C.M.R. §§ 21.00-2707, were promulgated to help Massachusetts enforce its laws forbidding tobacco sales to minors and thereby stem the rising tide of tobacco addiction by minors. The statistics are grim:

* More than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease, often suffering long and painful deaths. 61 Fed. Reg. 44396, 44398 (1996).

* Tobacco alone kills more people each year in the United States than AIDS, car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined. *Id.*

* One out of every three children who become regular smokers will die prematurely from a tobacco-related disease. *Id.* at 44399.

After these facts were published in 1993 and 1994, one might have expected tobacco use among minors to decline. It has not. The number of children and adolescents using tobacco products has increased, despite law in all fifty states banning the sale of tobacco products to anyone under age 18. In 1994, the Surgeon General reported that approximately three million American adolescents smoked cigarettes and an additional one million adolescent males used smokeless tobacco. *Id.* at 44398 (citing HHS, Office on Smoking and Health, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* at 5 (GPO 1994) ("1994 Surgeon General Report")). Today, "[a]t least 4.5 million adolescents (aged 12-17 years) in the United States smoke cigarettes." *CDC Fact Sheet* at <www.cdc.gov/tobacco/research_data/youth/initfact.htm> (visited Mar. 1, 2001). Each day, more than 6,000 minors try their first cigarette. CDC, *Incidence of Initiation of Cigarette*

Smoking Among U.S. Teens at <www.cdc.gov/tobacco/research_data/youth/initfact.htm> (visited Mar. 1, 2001). And each day, more than 3,000 minors become daily smokers. *Id.*; *see also* 61 Fed. Reg. 44568 (about one million minors start to smoke each year).

Time and again, studies have shown that tobacco use begins with kids. Children try their first cigarette at an average age of 14½. 61 Fed. Reg. 45239 (citing 1994 Surgeon General's Report at 67). Eighty-two percent of adults who have ever smoked had their first cigarette before age 18. *Id.* More than half of them have already become regular smokers by that age. *Id.* The average age when people become daily smokers is approximately 17½. *Id.*

Despite massive federal and state efforts to combat tobacco use by minors, children continue to smoke and chew tobacco. In the mid-1990s, cigarette smoking increased among high school students nationwide. CDC, *Tobacco Use Among Middle and High School Students—United States, 1999*, 49 Morbidity and Mortality Weekly Report 49 (Jan. 28, 2000) ("MMWR"). As of 1999, nearly 13% of middle school students and nearly 35% of high school students used tobacco products. *Id.* As reported by the Centers for Disease Control, "frequent smoking" rates (defined as smoking on 20 or more of the previous 30 days) for high school students rose from 12.7% in 1991 to 16.8% in 1999 and showed no sign of leveling off. CDC, *Trends in Cigarette Smoking Among High School Students—United States 1991-1999*, 49 MMWR 756-57 (Aug. 25, 2000). In addition, although black high school students had been smoking cigarettes at a lower rate than other racial groups, the lower rate no longer applies to black middle school students, who smoke cigarettes at a rate comparable to that of their peers. 49 MMWR at 49, 51.

In Massachusetts in particular, the smoking rate for high school students increased 14% from 1993 to 1997, reaching its

peak in 1995, although the rate appears to be tapering off. "Frequent" smoking increased 19% from 1993 to 1997. CDC, *Cigarette Smoking Among High School Students—11 States, 1991-1997*, 48 MMWR 686 (Aug. 13, 1999).

Just as tobacco use is prevalent among kids, so too is tobacco addiction. As many as 92% of all cigarette smokers and 75% of all young people who regularly use smokeless tobacco consume those products because they are addicted to nicotine. 61 Fed. Reg. 44635-36. A 1997 study found that, although three-fourths of the high school students who had ever been daily smokers had tried to quit, only 13.5% of those students had been successful (that is, had not smoked in the previous thirty days). CDC, *Selected Cigarette Smoking Initiation and Quitting Behaviors Among High School Students—United States, 1997*, 47 MMWR 386 (May 22, 1998).

Nicotine's addictiveness is now virtually undisputed. Although for many years the tobacco industry feigned ignorance of the addictive nature of its products, the Food and Drug Administration ("FDA") tobacco rulemaking presented overwhelming evidence that the industry's prior public statements were lies. For example, a Philip Morris report quoted by the FDA cited nicotine as "the primary reason" why people smoke and placed cigarettes in the category of "nicotine delivery devices," along with nicotine patches and nicotine gum. 61 Fed. Reg. 44854, 44866. An R.J. Reynolds memorandum, referring to "the confirmed user of tobacco products," acknowledged that "[h]is choice of product and pattern of usage are primarily determined by his individual nicotine dosage requirements. . . ." *Id.* at 44868. Brown & Williamson and its parent BATCO have referred to nicotine as the reason "why people inhale smoke." *Id.* at 44880. As stated by the Centers for Disease Control, "[a]s with other drug addiction, nicotine dependence is a progressive, chronic, and relapsing disorder."

47 MMWR at 387. To fight this disorder, "[t]he optimal public health strategy is to prevent tobacco use completely or to intervene as early" as possible. *Id.*

Because "[n]early all first use of tobacco occurs before high school graduation . . . if adolescents can be kept tobacco-free, most will never start using tobacco." 1994 Surgeon General Report at 5. In other words, because tobacco use begins in childhood, any effective effort to reduce the incidence of serious and often fatal health effects of using tobacco products must begin with children.

A significant part of the effort to keep adolescents tobacco-free is keeping them from exposure to tobacco advertising. As documented in the FDA's comprehensive examination of tobacco use among young people, advertising plays a material role in the decision of children to use tobacco. 61 Fed. Reg. 44489. Perhaps the most telling statistic is this: 86% of minors who smoke use one of the three most advertised brands, while the most common choice among adult smokers is brandless cigarettes (private label, generics, or plain packaged products). *Id.* at 44482. A 1993 study showed that 60% of adolescent smokers preferred the most heavily advertised brand, Marlboro, but only 23.5% of adult smokers did so; 13.3% of adolescent smokers preferred Camels, the second most advertised brand, in contrast to only 3.9% of adults; and 12.7% of adolescent smokers preferred Newport, the third most advertised brand, as compared to only 4.8% of adults. CDC, *Comparison of Advertising to Brand Preference on Adolescents and Adults, 1993,* available at <www.cdc.gov/tobacco/research_data/ advcoadv/brndtbl.htm> (visited Mar. 1, 2001); *see also* 60 Fed. Reg. 41314, 41333 (1995) (introduction of brands marketed to females associated with sharp increase in smoking rate of girls under 18 but not in rate of women 18 and over).

Another survey reported that 87% of adolescents could recall seeing one or more tobacco advertisements and half could identify the brand associated with one of four slogans. *Id.* at 41332. This finding is significant because children who smoke are more likely than children who do not to identify the brand associated with various cigarette ads and slogans. *Id.* Thus, in another study, high school students who smoked recognized 61.6% of tobacco ads, while non-smokers recognized only 33.2%. *Id.*

Although advertising is not solely responsible for minors' decisions to smoke, research shows that tobacco advertising has both "predisposing and reinforcing effects on youth smoking . . . [that] generally apply after holding constant the established influence of parental, sibling, and friend's smoking." Wakefield, *et al.*, *Changes at the point-of-purchase for selling tobacco following the 1999 tobacco billboard advertising ban* at 11-12 (U. of Ill. at Chic. 2000). Internal industry documents demonstrate that, for many years, the industry has banked on this fact, making a concerted efforts to attract young smokers and "presmokers" through advertising. 61 Fed. Reg. 44480.

For example, focusing on the need to attract adolescents, one cigarette company memorandum discussed strategy for "[a]ds for teenagers." 60 Fed. Reg. 41330. The advertising executive who created the Marlboro cowboy stated: "The Marlboro cowboy dispels the myth that in order to attract young people, you've got to show young people." *Id.* And in 1990, R.J. Reynolds devised a "Young Adult Smokers" program, one aspect of which involved identifying retailers "located across from, adjacent to . . . [and] in the general vicinity of" high schools and college campuses. *Id.*

As a 1976 R.J. Reynolds Research Department memorandum states, "Evidence now available . . . indicate[s] that the 14 to 18 year old group is an increasing segment of the

smoking population. RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained in the long term." 61 Fed. Reg. 44481. R.J. Reynolds followed through on this advice in 1986 with the Joe Camel advertising campaign. Before then, Camel had less than 3% of the youth market. *Id.* at 45246 (citing 1994 Surgeon General Report at 70). By 1991, a study found that 30% of 3-year-olds and 91% of 6-year-olds could identify Joe Camel as a symbol for smoking. *Id.* at 45246. By 1992, Camel had 13-16% of the youth market. *Id.* During that same time period, adult use of Camel showed no significant increase. *Id.* (citing 1994 Surgeon General Report at 70).

Petitioners portray the Master Settlement Agreement ("MSA") between the states' Attorneys General and the tobacco industry as having resolved the issue of advertising to minors. Petitioners are wrong. "Cigarette marketing to teens through magazine advertising increased after the Master Settlement Agreement took effect in November 1998." Turner-Bowker (Mass. Dept. of Health) & Hamilton, *Cigarette Advertising Expenditures Before and After the Master Settlement Agreement: Preliminary Findings* 1 (May 15, 2000). More specifically, the tobacco industry spent more than one-third of its total magazine advertising expenditures for the first nine months of 1999 on magazines with more than 15% youth readership. *Id.* The industry spent approximately $30 million more on advertising in these magazines in those nine months than it had spent in the same months of 1998. *Id.* Advertising for Marlboro alone increased by $26.1 million in magazines with 15% or more youth readers—a $5.2 million increase over the amount spent the prior year. *Id.* Advertising for Kool in those magazines increased by $4.3 million, or 75.8%. *Id.* at 2. Brown & Williamson showed the largest percentage increase—72.1% percent, and R.J. Reynolds had the biggest dollar increase—$11 million. *Id.* at 3.

After the MSA, the tobacco industry also increased point-of-purchase advertising. According to the Federal Trade Commission, ads posted at retail locations "grew by $38.7 million (13.3%) from 1998 ($290.7 million) to 1999 ($329.4 million)." FTC, *Cigarette Report for 1999* at 4 (issued 2001). Industry spending on retail value added offers (such as "buy three, get free T-shirt," where the cigarette product and the bonus item are packaged together as a single unit) grew by $1 billion (64.6%) from 1998 ($1.56 billion) to 1999 ($2.56 billion). *Id.* at 5. These figures confirm another recent study, which found significant increases in interior store advertising, exterior store advertising, in-store promotions (for example, cents-off promotions), and tobacco-related objects (for example, clocks with brand logo). Wakefield, *supra* at 3. Likewise, in light of the "growing evidence that cigarette advertising and promotions increase youth smoking," the increase in such advertising is of "particular concern from the perspective of those seeking to reduce teenage smoking," *id.* at 11, especially since "three out of four teenagers visit a convenience store at least once per week." *Id.* at 12.

Moreover, although the MSA has affected where the tobacco industry spends it advertising dollars, it has not resulted in a decrease in the total dollars spent. In fact, total tobacco industry advertising has grown from $5.67 billion in 1997, to $6.73 billion in 1998, to $8.23 billion in 1999. *Cigarette Report for 1999* at 16. Industry expenditures for magazine and newspaper advertising continue to rise, as does spending on point of sale advertising, direct mail, and public entertainment (for example, sponsorship of sporting events). *Id.*

Today, no one, not even Philip Morris, disputes that smoking and chewing tobacco products are hazardous and often deadly. No one disputes that people who regularly use tobacco products begin to do so when they are kids. If the Commonwealth of Massachusetts, indeed, if the nation, is to make significant and sustainable inroads against the cancer,

heart disease, lung disease, and deaths caused by tobacco products, it must focus on protecting kids from the advertising that persuades children to use tobacco products in the first place.

SUMMARY OF ARGUMENT

1. The Massachusetts regulations are not preempted by section 5 of the Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334. The Attorney General's brief explains why the tobacco industry's preemption argument—squarely rejected by all but one of the circuit courts to consider it—cannot be reconciled with the text or purpose of the Act. We highlight one point below: The industry's reading of the preemption provision would yield a result that is antithetical to Congress's overall goals in the Act. As petitioners read it, section 5 of the Act sweeps so broadly that it forbids *any* local regulation of *any* sort of tobacco advertising and promotion. There simply is no indication in the text of section 5, the remainder of the Act, or its legislative history, that Congress intended to immunize the tobacco industry from all local regulation of tobacco advertising. Nonetheless, this Court would have to reach precisely that conclusion to uphold industry's across-the-board preemption claim.

2. The Massachusetts regulations survive First Amendment review because they directly serve the substantial—indeed compelling—governmental objective of reducing tobacco consumption by minors and are narrowly crafted to that end. We leave to the Attorney General the straightforward task of explaining why the regulations at issue here pass muster under *Central Hudson*.

Apparently even petitioners recognize the weakness of their *Central Hudson* argument. Their main plea is not that the regulations fail *Central Hudson* review, but that this Court should discard the *Central Hudson* test in cases where the restriction limits the dissemination of truthful, nonmisleading

information for reasons "unrelated to the preservation of a fair bargaining process." Pet. Br. at 28 (citations omitted). In those cases, and petitioners say that this is one, the Court should apply strict scrutiny. We make three points that might not stand out in the Attorney General's more comprehensive treatment of the issues.

First, this Court should reject petitioners' invitation to scrap more than twenty years of consistently-applied precedent that has followed and refined *Central Hudson*. We are not here to praise *Central Hudson*, but we strongly oppose its burial. *Central Hudson* reflects a high degree of sensitivity to First Amendment values, while, at the same time, it recognizes that government often has a legitimate need to regulate the communicative aspects of commercial transactions to protect consumers. *Central Hudson* has worked well over the past two decades because it places a heavy, but not insurmountable, burden on government to demonstrate that its interest in protecting consumers from fraud, deception, or overreaching is substantial and that it has tailored its speech restraints as narrowly as possible. The fact that only a handful of the restraints reviewed by the Court have been upheld belies petitioners' suggestion that *Central Hudson* does not adequately protect First Amendment values. Petitioners may fret over *Central Hudson*'s approach, but they have no warrant to complain about its results.

Second, petitioners are wrong to claim that the Massachusetts regulations were imposed for reasons unrelated to the preservation of a "fair bargaining process." The regulations are, in fact, designed precisely for that purpose. There is nothing "fair" about petitioners deliberately marketing tobacco products to children. What is striking about petitioners' brief is how little attention it pays to the overwhelming public health imperative that led Massachusetts to act. The tobacco industry ignores both its sordid history of marketing its products directly to our nation's youth and its success in enticing 6,000

children each day to try cigarettes for the first time. Wishful thinking cannot change history. Having thrown down the gauntlet by attempting to end run Massachusetts' law forbidding the sale of tobacco products to minors, industry may not now be heard to complain that Massachusetts has picked up that gauntlet by protecting the Commonwealth's children from the industry's advertising assault.

Finally, whatever concerns the Court may have about *Central Hudson*, this case is a singularly inappropriate vehicle for the Court to consider its modification. Contrary to petitioners' protestations that Massachusetts has imposed a near-total ban, this case is about line-drawing and nothing more. No broad-scale restraint on petitioners' expressive activities has been imposed; petitioners remain free to communicate to adults through newspaper, magazine, telephone, and direct mail marketing. And the industry concedes that the First Amendment does not forbid Massachusetts from barring billboard advertising across the street from elementary schools. Thus, the question here is whether Massachusetts has gone too far to protect its children from the tobacco industry's marketing effort by limiting the industry's use of outdoor signs and indoor displays. The answer to that question is plainly no. Accordingly, this case is not a suitable vehicle for considering whether *Central Hudson* requires modification.

I. THE MASSACHUSETTS REGULATIONS ARE NOT PREEMPTED.

Petitioners' preemption argument turns on whether Congress, when it revisited cigarette labeling in 1969, intended to abrogate the police powers of state and local governments to regulate any aspect of tobacco advertising. According to petitioners, although the Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970) (the "Cigarette Act"), says nothing about state control over the location of tobacco product advertising, Congress intended the Act's

preemption provision, section 5(b), 15 U.S.C. § 1334(b), to bar state regulation in that area. Under petitioners' theory, Massachusetts could not forbid the tobacco industry from placing large billboards across the street from schools, distributing tobacco promotions on playgrounds, or advertising their products in school newspapers because all of those measures would, in the words of section 5(b), constitute "requirements . . . based on safety and health . . . with respect to advertising."

Fortunately for the children of Massachusetts, the context, history, and policy behind the Cigarette Act demonstrate the error in the industry's reading of section 5(b). Amici agree with the Attorney General that the language of section 5(b) does not evidence congressional intent to preempt location-specific regulations, and we will not repeat the Attorney General's textual analysis. At the same time, reducing the preemption question to a syllable-by-syllable examination of section 5(b), as petitioners propose, risks losing perspective on the provision as a whole and on the role of that provision in the Cigarette Act. As Judge Learned Hand put it, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 409 (1945).

Three fundamental principles of statutory construction frame the preemption analysis here and compel the conclusion that the Cigarette Act does not preempt the Massachusetts regulations. First, because of the importance of preserving our delicate state-federal balance, *Hillsborough County v. Automated Medical Laboratories., Inc.*, 471 U.S. 707, 713 (1985), there is a strong presumption against preemption that may only be overcome by a "clear and manifest" congressional intent to oust state and local law. *Id.* at 715; *see Hawaiian*

Airlines, Inc. v. Norris, 512 U.S. 246, 252 (1994); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 611 (1991). Second, this powerful presumption is even stronger where, as here, preemption would displace the historic power of the state to protect the health and safety of its children by traditional means, like zoning regulations. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, in construing statutes, this Court considers the "provisions of the whole law," including "its object and policy." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990). These considerations may be crucial, as the meaning of a statutory provision "is often clarified by the remainder of the statutory scheme." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988); *see also New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (rejecting literal reading of preemption provision where to do otherwise "would be to read Congress' words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress speaks to the matter with generality").

Application of these principles belies petitioners' contention that the Cigarette Act forbids state regulation of the placement of tobacco advertising. To begin with, petitioners' argument looks at section 5(b) in isolation from the remainder of the Act. Consideration of the Act as a whole undercuts petitioners' argument. In addition to changing the 1965 preemption provision, discussed below, the 1969 Act revised the specific content of required warnings for cigarette packages (§ 4), banned advertisements on electronic media (§ 6), and temporarily extended and then ended the ban on the Federal Trade Commission requiring a health warning for advertising (§ 7(a)). The 1969 Act did *not* impose warning requirements for advertising, and Congress did not do so until 1984. *See* Comprehensive Smoking Education Act, Pub. L. No. 98-474, *codified at* 15 U.S.C. § 1333. Thus, considering section 5(b) in the context of the 1969 Act as a whole makes evident that

Congress's concern about conflicting state and local regulation extended to, but no further than, the *content* of the warnings. Congress was unconcerned about the placement or size of tobacco advertising in 1969 and therefore left those matters unregulated. *See infra* note 6.

This Court's prior review of section 5(b) further supports the Attorney General's reading. In *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), the plurality construed section 5(b) by looking to the language of the preemption provision, the statute as a whole, and the purposes of the Cigarette Act. The Court considered each of the common-law claims at issue and found preemption only where the claims would have "require[d] a showing that [the tobacco company's] post-1969 advertising or promotions should have included additional, or more clearly stated, warnings." *Id.* at 524. *Cipollone* also held that Congress intended the phrase "related to smoking and health" to be construed "narrowly." *Id.* at 529; *see also New York Conference of Blue Cross & Blue Shield Plans*, 514 U.S. at 655 ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes preemption would never run its course . . . ."). This reading, the *Cipollone* Court explained, "is wholly consistent with the purposes of the 1969 Act" which was concerned with "diverse, nonuniform, and confusing" standards. *Id.; see also* 15 U.S.C. § 1331(2)(B). Of course, the Massachusetts regulations are no more "diverse, nonuniform, and confusing" than zoning rules, which vary state by state and even county by county. Nor has Massachusetts sought to burden interstate commerce, as Congress feared might occur, by seeking to restrain tobacco advertising in magazines targeted to minors.

To uphold petitioners' sweeping preemption theory, this Court must conclude that it was Congress' "clear and manifest purpose" to deprive states of the power to impose zoning-like restrictions to fence out tobacco advertising in areas where children live, play, and go to school. Because there is no

evidence that Congress intended to eliminate state power, petitioners' argument should be rejected.

II. THE MASSACHUSETTS REGULATIONS ARE CONSISTENT WITH THE FIRST AMENDMENT.

A. *Central Hudson* Should Be Retained.

In the twenty-one years since *Central Hudson*, this Court has applied its four-part test to decide every one of the nearly two dozen commercial speech cases that it has considered. The tobacco industry labors to avoid *Central Hudson* review, no doubt because the tailored restraints at issue here pass muster.

To avoid this result, the tobacco industry has launched an all-out attack on *Central Hudson*, contending that it does not provide sufficient protection to First Amendment values in cases in which "the government engages in content-based regulation of commercial speech 'for reasons unrelated to the preservation of the fair bargaining process.'" Pet. Br. at 28 (quoting *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 489, 501 (1996) (plurality)). The industry argues that the Court should, in essence, create two tiers of commercial speech jurisprudence: In cases where the government is seeking to prevent consumer harm by regulating speech that is untruthful, misleading, or deceptive, the industry has no quarrel with the application of the *Central Hudson* test. But where the government seeks to regulate "truthful speech" or engages in "content-based" regulation and does so for reasons unrelated to its interest in proctoring the underlying commercial transaction, full-bore strict scrutiny should be applied.

1. The most glaring flaw in petitioners' argument that *Central Hudson* is too lax is that it is not borne out by the Court's track record in commercial speech cases. Despite petitioners' scorching rhetoric condemning *Central Hudson* and suggesting that it permits government to censor truthful speech

about disfavored products, the industry's brief offers not one illustration of a post-*Central Hudson* case that reached the wrong result. Petitioners thus ask this Court to chase a phantom. This Court has never upheld a commercial speech restraint under *Central Hudson* that was imposed for reasons unrelated to the integrity of the underlying commercial transaction.[2]

To be sure, in many post-*Central Hudson* cases the restraint could reasonably be characterized in the same terms that the industry uses to describe the Massachusetts regulation: namely, a content-based rule which broadly suppresses speech solely to manipulate consumer choice. Consider the Court's three most recent commercial cases—*Greater New Orleans Broadcasting Association v. United States*, 527 U.S. 173 (1999), *44 Liquormart*, and *Rubin*. All three addressed categorical restraints on the provision of truthful information relevant to consumer choice about a lawful, but arguably disfavored, product. In each case, the Court unanimously struck down the restraint under *Central Hudson*. Thus, the most fundamental problem with petitioners' attack is that, although they sound the censorship alarm, they have failed to produce any

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[2] Petitioners' amici, Infinity Outdoor, Inc., and Vista Media Group, Inc., contend that *Central Hudson* should be overhauled because it fails to provide needed predictably in this important area of the law. They blame the steady stream of commercial speech cases that come before the Court on *Central Hudson*. That argument is misleading. Many, if not most, post-*Central Hudson* cases have involved statutory or regulatory restraints, some plainly paternalistic, imposed *prior* to *Central Hudson* that were invalidated by lower courts and thus properly commanded the attention of this Court. *See, e.g., Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993).

evidence of smoke, let alone of fire. *Central Hudson* does not open the door to state censorship.

2. *Central Hudson* is, in fact, well crafted to root out and repudiate government restrictions on speech unrelated to the integrity of the bargaining process. Under *Central Hudson*, the government bears the burden of demonstrating that its restraint is narrowly tailored to protect consumers from fraud, deception, or overreaching. *Edenfield*, 507 U.S. at 771. Restraints imposed to keep consumers "in the dark" or "manipulate" consumer choice cannot survive that aspect of *Central Hudson* review, and not one has. *See 44 Liquormart*, 517 U.S. at 518, 523 (Thomas, J., concurring).

Edenfield illustrates this point. There, this Court struck down a restraint on in-person solicitation of potential business clients by certified public accountants (CPAs). Although the Court found that the interest asserted by the state—the preservation of the independence and integrity of CPAs—was substantial in theory, the state submitted no evidence showing that the restraint directly supported that purpose. The *Edenfield* Court emphasized that it is not enough for a state simply to point to a substantial governmental interest. Rather, the government must establish that the restriction advances its interests "in a direct and material way." 507 U.S. at 767. The burden cannot be sustained by "mere speculation or conjecture." *Id.* at 770. The state "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* at 771. Without this requirement, the Court stressed, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial speech." *Id.*; *see also Greater New Orleans*, 527 U.S. at 188; *Rubin*, 514 U.S. at 487. *Central Hudson* already forbids a state from imposing

speech restraints for reasons unrelated to the underlying commercial transaction.[3]

On the other side of the coin, in each of the handful of cases upholding commercial speech restraints, the Court has concluded that the restraint was tailored to preserve an important aspect of the bargaining process. For example, in *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 631-32 (1994), the Court found that a thirty-day waiting period during which lawyers could not use direct mail solicitations to contact recent accident victims and their families was necessary to ensure that the choice of counsel was made with careful, clear-headed reflection. In *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428, 430 (1993), the Court upheld the enforcement of the federal Lottery Act to advance the interest of a non-lottery state in not having lottery advertisements broadcast in its jurisdiction. And in *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 462-67 (1978), the Court concluded that the potential for overreaching by lawyers engaged in direct, in-person solicitation of clients justified the imposition of sanctions against a lawyer who had personally solicited a young accident victim in a hospital.

Petitioners take issue with none of these decisions. But these seem to be precisely the cases about which they complain because each involved speech that was truthful and nonmisleading, and each involved a restraint that could be characterized as paternalistic and unrelated to the bargaining

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[3] The one exception is *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), where an advertising ban was imposed to suppress demand for casino gambling by residents of Puerto Rico. As members of the Court pointed out in *Liquormart*, the outcome in *Posadas* would likely be different today given the refinements made to *Central Hudson* in more recent decisions. *See Liquormart*, 517 U.S. at 509-10 (opinion of Stevens, J.); 531-32 (O'Connor, J., concurring).

process. Clearly, these precedents would be vulnerable under petitioners' approach. Thus, petitioners are not proposing a modest alteration to the law of commercial speech, but rather a wholesale reformation that would call into question a number of the Court's established precedents. Not only are petitioners wrong on the merits, but principles of *stare decisis* counsel against such a precipitous change in course.

3. Finally, the tobacco industry argues that this Court should erect a two-tiered approach in commercial speech cases, based on the state's motivation for imposing the restraint. Where the restraint is imposed to prevent consumer harm, *Central Hudson* should be retained. But where the state is regulating "for reasons unrelated to protect[ing] the fairness and integrity of commercial transactions," strict scrutiny should be applied. Pet. Br. at. 28. The industry's argument should be rejected.

First, petitioners' motive test is unworkable. Petitioners' brief says not a word about how a court would go about determining *why* a restraint was imposed or how it would differentiate between the two categories of restraints. Restraints do not come with labels identifying whether they were imposed for noble or paternalistic reasons. And probing legislative motive, especially at the state level, is rarely a simple task. *Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 216 (1983). In contrast, under *Central Hudson*, the Court avoids the briar patch of identifying motive by generally accepting the legitimacy of the government's asserted interest and deciding the case on less subjective grounds. The Court has done so even when the parties vigorously dispute the government's motivation (*e.g.*, *Edenfield*), even when there is reason to suspect that the asserted reason is pretext (*e.g.*, *Rubin*), and even when the Court strikes down the restraint (*e.g, 44 Liquormart*).

Examining one case exposes the futility of petitioners' approach. In *Edenfield*, the state, as petitioner, argued that the no-solicitation rule was imposed to protect the independence of CPAs in exercising the attest function; Mr. Fane, the respondent CPA, contended that the no-solicitation rule was imposed to stifle competition. 507 U.S. at 674, 678. Under *Central Hudson*, the Court did not have to decide, as a matter of fact, which side was right. Under petitioners' formulation, however, to determine whether to apply strict or intermediate scrutiny, courts would first have to ascertain the reason why the restraint was imposed, often on the basis of inconclusive, misleading, or nonexistent legislative history. This Court should not throw lower courts into that thicket.

Second, petitioners' "motive" approach would upset settled law. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-73 (1976), and succeeding cases, the Court has recognized that, as a discrete category of expression entitled to less than full First Amendment protection, commercial speech restraints may be based on content. *See, e.g., Central Hudson,* 447 U.S. at 564 n.6 ("[t]wo features of commercial speech permit regulation of its content," commercial speakers are "well situated to evaluate the accuracy of their messages" and commercial speech is a "hardy breed of expression not susceptible to being crushed by overbroad regulation"); *R.A.V. v. St. Paul,* 505 U.S. 377, 388-89 (1992); *id.* at 422 (Stevens, J., concurring). Petitioners' approach would disturb twenty-five years of unbroken precedent.

Moreover, petitioners' content- and viewpoint-based argument is circular. As *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), emphasizes, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Accord R.A.V.*, 505 U.S. at 386. Petitioners' content- and viewpoint-discrimination argument

evaporates unless petitioners can substantiate their accusation that Massachusetts, like the FDA, New York City, Baltimore, Chicago, and the many other jurisdictions that have restricted or sought to restrict outdoor tobacco advertising, has done so "because of disagreement" with the industry's message, not to enforce laws prohibiting tobacco sales to minors. Under petitioners' theory, any time government seeks to regulate the advertising or promotion of a product that poses a special danger to the public and thus may be described as "disfavored"—such as alcohol, firearms, and pornography—the products' sellers can escape regulation by arguing content- and viewpoint-based discrimination and claiming "censorship." That is not the law, nor should it be.

Finally, *R.A.V.* does not provide a basis for the motive-based distinction petitioners claim is required. *R.A.V.* ruled that the First Amendment's hostility to content- and viewpoint-based regulation extends even to categories of speech entitled to no First Amendment protection. The Court found St. Paul's "fighting word" ordinance content- and viewpoint-based because it penalized only bias-motivated offenders, and thus the City had crossed the line between permissible *category*-based regulation to impermissible *content*-based regulation. But nothing in *R.A.V.* suggests that the Court abandoned its categorical approach to deciding what level of constitutional protection attaches to different types of speech.

Petitioners nonetheless contend that "if, as *R.A.V.* held, these restrictions on content discrimination apply to entirely unprotected categories of speech, they must also apply to commercial speech, which *is* protected." Pet. Br. at 30. To be sure, if Massachusetts did what St. Paul did in *R.A.V.*, and banned only tobacco advertising that promoted smoking "on the basis of race, color, creed, religion or gender," 505 U.S. at 384, principles of content discrimination would apply, just as in *R.A.V.* *See Greater New Orleans*, 527 U.S. at 193-94 (commercial speech restraints that "select among speakers" are

"in tension with the principles undergirding the First Amendment"). But petitioners do not make the far-fetched claim that the Massachusetts regulations do anything of the sort. Rather, petitioners' claim is that the *exception* recognized in *R.A.V.*—that the government is forbidden from punishing even unprotected speech by imposing "special prohibitions on those speakers who express views on disfavored subjects," 505 U.S. at 391—swallows whole the Court's longstanding rule that content-based regulation is not only permitted in the commercial speech context, it is unavoidable. Thus, Massachusetts' tobacco advertising regulations are fully consistent with *R.A.V.*'s holding, as is the continued application of *Central Hudson*.

B. The Massachusetts Regulations Were Implemented To Preserve The Fair Bargaining Process.

The linchpin of petitioners' First Amendment argument is their accusation, utterly unsupported in the record and utterly wrong, that the Massachusetts regulations were implemented to stifle any positive mention of tobacco products because they are "disfavored." Casting Massachusetts in the role of censor, the tobacco industry portrays itself as the victim, stymied in its ability to communicate its selling message to adults. In making this argument, petitioners ignore the regulations' history and pretend that they appeared as a bolt out of the blue in 1998. Pet. Br. at. 3-4. The image of the tobacco industry as the victim of "heavy-handed" regulation, Pet. Br. at 25, is revisionism at its worst.

The Massachusetts regulations are a direct response to unequivocal evidence that became public in the mid-1990s that the tobacco industry had for years engaged in a sustained, systematic campaign to market its products to minors. That campaign paid off with dividends. Despite the intense efforts of the federal government and of Massachusetts and other states to use education, enforcement, counter-advertising, and every

other available tool to combat underage tobacco use, the rate of tobacco use among children continued to skyrocket. In 1994, about 3 million teenagers smoked cigarettes; today that number has grown to 4.5 million. Each day, more than 6,000 minors try their first cigarette, and each day, more than 3,000 minors become daily smokers. *See supra* at pages 2-3.

Petitioners understand these statistics. Indeed, this steady stream of new underage smokers keeps their industry afloat. Virtually no adult takes up smoking; well over 80% of all smokers are addicted by the time they turn 18. Thus, unless the tobacco industry persuades children to become smokers, it has no future.

Massachusetts' regulations were imposed to advance the Commonwealth's legitimate, indeed, compelling interest in enforcing its laws forbidding the sale of tobacco products to minors. Massachusetts has rightly concluded that the industry will continue to attempt to avoid the ban on sales unless the state shields minors from the selling messages of an industry that has long targeted children. That is not censorship; it is responsible government. Tobacco companies may continue to market their products directly to adults through newspapers, periodicals, direct marketing, public entertainment sponsorship, and other means. And they do. Despite petitioners' hyperbolic claims that Massachusetts has imposed a near-total or blanket ban, *see, e.g.*, Pet. Br. at 25, 46, nothing in the record suggests that the flow of advertising in Massachusetts has diminished as a result of its regulations. Indeed, from 1998 to 1999, the industry's advertising expenditures nationwide rose from 6.7 *billion* dollars to 8.2 *billion* dollars—hardly an industry muzzled. *Cigarette Report for 1999*, at 16. The constitutional question before this Court is whether a state may take reasonable precautions to shield children from an advertising message designed to entice them to use a product that they may not lawfully purchase. The answer to that question is plainly yes.

The Court's decision in *Went for It* is particularly instructive. There, the Court sustained an outright prohibition on one highly effective mode of communication—direct mail solicitations to recent accident victims—not because the information conveyed was harmful or false (indeed, the information was concededly accurate and useful to many), but rather because the information would be conveyed in a manner and at a time harmful to some and because ample channels of communication remained opened for injured Floridians to find counsel. 515 U.S. at 633-34. That logic applies with full force here. Outdoor tobacco advertising can be restricted because it is harmful to a significant segment of vulnerable viewers—children—while adults have many other sources to gather whatever information (if any) is conveyed in tobacco advertising.[4]

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[4]Any other rule would jeopardize the ability of states and local governments to restrain the advertising of products unsuited to minors. The First Amendment does not prevent a state or city from barring outdoor advertising for alcohol, firearms, condoms, pornography, or prescription drugs at the doors of elementary schools, parks, playgrounds or any other place where children congregate. Yet petitioners' theory sweeps so broadly that it would forbid regulation of this sort. *See* Pet. Br. at 46-48. We agree that the government may not "reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 73-74 (1983) (citation omitted). But *Bolger*, *Butler v. Michigan*, 352 U.S. 380 (1957), and the other cases on which petitioners rely involved all-out bans. Nothing in this Court's cases suggests that the government may not impose carefully tailored location and manner restrictions to protect children from harmful speech, so long as other channels of communications remain open to adults. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 741-43 (1996) (plurality); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). That is all that Massachusetts has done.

The constitutionality of Massachusetts' regulations is reinforced by two separate strands of First Amendment doctrine. First, the Massachusetts regulations restrain speech that concerns an unlawful activity—the promotion and sale of tobacco products to minors. *E.g., Went for It*, 515 U.S. at 623-24 ("[T]he government may freely regulate speech that concerns unlawful activity."). As noted above, there can be no serious dispute that the industry has knowingly and deliberately profited from the substantial evasion of Massachusetts law prohibiting the sale of tobacco products to minors. *See* 60 Fed. Reg. 41330-31. Advertisements need not say "Children, buy Camels" to propose an illegal transaction. Nothing in the First Amendment disables Massachusetts from taking reasonable precautions to prevent children from being bombarded with tobacco industry ads where, as here, the evidence shows that such measures are essential to the effective enforcement of its laws forbidding tobacco sales to minors.[5]

Second, Massachusetts' focus on outdoor advertising is in keeping with the Court's captive audience doctrine. The child who, while walking or riding to school or the playground, confronts billboards, posters on buses, wall placards, store signs, point-of-sale displays visible through store windows, all promoting tobacco products, is no less a captive viewer than the bus rider in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). These ads are ubiquitous, durable, and permanent. Viewers, especially impressionable children, exercise "no choice or

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[5]Many products lawfully sold to adults may not be sold to minors (*e.g.*, alcohol, pornography, firearms) and not all advertising for these products can be said to propose an illegal transaction. Nonetheless, tobacco is, in some respects, unique. For no other product is there conclusive evidence that virtually all new consumers are children and that virtually no one begins using the product after age 18, and that, in recognition of those facts, the industry has long targeted its marketing efforts at children.

volition" in observing them, but instead have the message "thrust upon them." *Id.* at 302 (plurality opinion). Because of the invasiveness of fixed public advertising—especially outdoor signs—this Court has given state and local government significant regulatory leeway over such displays. *Cf. Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1981).

Sixty years ago this Court upheld far more sweeping restrictions on outdoor tobacco advertising in *Packer Corp. v. Utah*, 285 U.S. 105 (1932) (Brandeis, J.), a case petitioners do not address. *Packer* involved an equal protection challenge to a Utah statute (which is still on the books) making it a misdemeanor to display tobacco advertising on billboards, street cars, or other publicly visible locations. The Court upheld the Utah law, distinguishing outdoor advertisements, which "are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice and volition on their part," from "[o]ther forms of advertising [that] are ordinarily seen as a matter of choice." *Id. Packer* was not a First Amendment case, but the Court subsequently applied its distinction between intrusive or "captive audience" speech and speech one chooses to receive in upholding governmental restrictions on speech against First Amendment challenges. In *Lehman*, for example, the Court upheld a city's refusal to sell advertising space on mass transit vehicles to candidates for public office, largely because "[t]he streetcar audience is a captive audience." 418 U.S. at 302 (plurality); *see also id.* at 306-07 (Douglas, concurring) (emphasizing captive audience rationale). *Accord Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *see also R.A.V.*, 505 U.S. at 422 (Stevens, J., concurring) (citing *Packer* approvingly); *id.* at 415 (Blackmun, J., concurring) (stating that the "simple reality is that the Court will never provide child pornography or cigarette advertising the level of protection

customarily granted political speech"). There is no reason for this Court to disturb *Packer*.[6]

C. This Case Is About Line-Drawing, Not Censorship.

This case is a singularly inappropriate vehicle for the Court to consider modifying *Central Hudson*. To the extent that members of the Court have expressed concern about *Central Hudson*, those concerns have been raised in cases dealing with sweeping bans on the dissemination of truthful information imposed to manipulate the marketplace or keep consumers in the dark. *E.g.*, *44 Liquormart*, 517 U.S. at 509 (plurality); *id.* at 518 (Thomas, J., concurring).

In contrast, this case raises a classic question of line-drawing. It is agreed, we assume, that the First Amendment does not forbid Massachusetts from taking *some* measures to shield children from tobacco advertising. Thus, the question before the Court is not whether Massachusetts can take regulatory action, but whether Massachusetts has gone too far. This Court has repeatedly ruled that courts owe significant deference to governmental judgments in cases of line drawing, and, because of the impossibility of regulating with absolute precision, some degree of overinclusiveness is not only tolerated, it is expected in commercial speech cases. *Went for It*, 515 U.S. at 633; *Edge Broadcasting*, 509 U.S. at 432-34; *Board of Trustees v. Fox*, 492 U.S. 469, 479-80 (1989).

This case illustrates the wisdom of the Court's approach. Although the industry quibbles over the 1,000 foot rule, it admits that its own guidelines urge at least a 500-foot buffer

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[6] To sustain petitioners' preemption argument would also require the conclusion that Congress intended the Cigarette Act to overrule *Packer*. There is not a shred of legislative history suggesting that Congress sought to do so.

zone around schools, parks, and playgrounds for billboards. Pet. Br. at 46-47; *see also* Pet. App. at A31a. The industry wrongly suggests that somehow the MSA forecloses the use of billboards and large outdoor signs. The MSA applies *only* to its tobacco industry signatories; it does not restrict the use of billboards by other manufacturers or by *any* retailer. *See* Joint App. at 273-74.

Moreover, the 1,000-foot buffer zone was not, as petitioners contend, predicated on whether a sign can "possibly be seen from 1,000 feet." Pet. Br. at 47. The 1,000-foot rule was first proposed by the FDA to apply to *all* outdoor signage, not just billboards. 61 Fed. Reg. 44502-08. The restriction's purpose is to construct a *cordon sanitaire* around the parks, playgrounds, and schools that children frequent. *Id.* The industry understands that children do not descend into these places by helicopter; they walk, bicycle, or ride a bus or car to them. To ensure that tobacco ads are never out of a child's view, the industry strategically places ads near parks, playgrounds and schools and on adjacent streets, and it has done so for years. *See supra* page 6. In response, Massachusetts has determined that a 1,000-foot radius is required to shield children from the industry's effort to saturate its advertising at or near places where children spend time. Deciding how to draw a reasonable line—50, 500, or 1,000 feet—is quintessentially the job of legislatures or regulatory authorities, and federal courts should be wary about refereeing such disputes too closely.[7]

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[7]Indeed, this Court has struggled in picketing cases where line-drawing of this sort is often at the center of the controversy, but has generally respected reasonable legislative judgments in the absence of evidence that the restraints were imposed to discriminate among speakers. *See, e.g., Boos v. Barry*, 485 U.S. 312 (1988) (upholding provision of D.C. Code making it unlawful "to congregate" within 500 feet of embassies and consulates); *Colorado v. Hill*, 530 U.S. 703 (continued...)

This Court has recognized the difficulties of perfectly fine-tuning any regulation of expressive commercial activities. In *Fox*, for example, the Court made clear that if the regulation extends only "marginally beyond what would have adequately served the government interest," it will be sustained; a regulation will be set aside only when it is "substantially excessive, disregarding far less restrictive and more precise means." 492 U.S. at 479. That is also the lesson of *Edge Broadcasting*. There, the Court considered the difficult line-drawing problem Congress faced when it enacted the Lottery Act, which sought to protect the policies of non-lottery states without interfering unduly with the rights of states that sponsor lotteries. The statutory scheme was both overinclusive and underinclusive, since residents of non-lottery states would be subject to advertising from out-of-state transmitters, while residents of lottery states would be deprived of advertising from transmitters broadcasting from neighboring non-lottery states. Nonetheless, the Court upheld the scheme because the line Congress drew, while not perfect, was reasonable. 492 U.S. at 432-34.

Here, there is no reason to disturb the line drawn by Massachusetts. It is consistent with the line proposed by the FDA and adopted by a number of other jurisdictions. And it is a modest measure when weighed against one of the most serious public health problem our nation faces: the continuing tobacco addiction of our youth.

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[7](...continued)
(2000) (upholding statute banning contact within eight feet of individual who is within 100 feet of health clinic); *Burson v. Freeman*, 504 U.S. 191 (1992) (upholding picketing ban within 100 feet of polling place); *Frisby v. Schultz*, 487 U.S. 474 (1988) (upholding picketing ban in residential area); *Cox v. Louisiana*, 379 U.S. 559 (1965) (upholding picketing ban "near" courthouse).

CONCLUSION

For the reasons stated above and in the brief of respondent, the judgment below should be affirmed.

Respectfully submitted,

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